

11/20/03

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Empire Canyon

(UT Removal)

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Rick

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

GOVERNMENT
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IN THE MATTER OF:

Empire Canyon Site
Park City, Utah

United Park City Mines Company,
Respondent.

ADMINISTRATIVE ORDER ON
CONSENT FOR NON-TIME CRITICAL
REMOVAL ACTION

U.S. EPA Region 8
CERCLA Docket No. CERCLA-08-2004-0003

Proceeding Under Sections 104, 106(a), 107
and 122 of the Comprehensive
Environmental Response, Compensation,
and Liability Act, as amended, 42 U.S.C.
§§9604, 9606(a), 9607 and 9622

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent (Order) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and United Park City Mines (United Park or Respondent). This Order provides for the implementation of a non-time critical removal action (Removal Action) described in the site evaluation and an engineering evaluation/cost analysis (EE/CA) previously performed by Respondent. A copy of the EE/CA and EPA's Action Memorandum of November 6, 2003 (Action Memorandum) authorizing the Removal Action are attached hereto as Appendices 1 and 2, respectively.

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§9604, 9606(a), 9607 and 9622, as amended (CERCLA).

3. EPA has notified the State of Utah (the State) of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. §9606(a). The State has declined to participate as a party to this Order.

4. EPA and Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms.

II. PARTIES BOUND

5. This Order applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter the Respondent's responsibilities under this Order.

6. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

III. DEFINITIONS

7. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"Action Memorandum" shall mean the EPA Action Memorandum relating to the Empire Canyon Site signed on November 6, 2003 by Max H. Dodson, Assistant Regional Administrator for the Office of Ecosystems Protection and Remediation, U.S. EPA Region 8. The Action Memorandum is attached hereto as Appendix 2.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§9601, *et seq.*

"Day" shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or State or Federal holiday, the period shall run until the close of business of the next working day.

"Effective Date" shall be the effective date of this Order as provided in Section XXIX.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"UDEQ" shall mean the Utah Department of Environmental Quality and any successor departments or agencies of the State.

"Future Response Costs" shall mean all costs including, but not limited to, direct and indirect costs that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, in verifying the Work, or otherwise in implementing, overseeing, or enforcing this Order. Future Response Costs may include, but are not limited to, payroll costs, contractor costs, travel costs, laboratory costs, and costs incurred pursuant to Paragraph 30 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 40 (emergency response), or Paragraph 66 (work takeover).

"Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. §9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. §9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

"Matters Addressed" means the **"Work"** Respondent agrees to perform and **"Future Response Costs"** at the Site, as those terms are further defined in this Order. **"Matters Addressed"** specifically excludes EPA's rights to enforce those matters set forth in Section XX (Reservation of Rights) of this Order.

"National Contingency Plan" or **"NCP"** shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. §9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Order" shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this Order and any Appendix, this Order shall control.

"Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

"Parties" shall mean EPA and Respondent.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

"Respondent" shall mean United Park City Mines Company.

"Section" shall mean a portion of this Order identified by a Roman numeral.

"Site" shall mean the Empire Canyon Site, which is located at the geographic coordinates 40° 38' 40" north latitude and 111° 29' 38.5" west longitude as defined in Appendix 3.

"State" shall mean the State of Utah.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. §9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. §9601(33); and (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. §6903(27); and (4) any "hazardous material" as defined by applicable Utah law.

"Work" shall mean all activities Respondent is required to perform under this Order.

"Work Plan" shall mean the EPA-approved document developed pursuant to Paragraph 21 of this Order and identifying the activities and tasks to be performed by the Respondent to implement the removal action selected in the **"Action Memorandum,"** as defined herein. This **Work Plan** may include discrete tasks to be performed by Respondent and a schedule of milestones for measuring progress in conducting the **"Work."**

IV. FINDINGS OF FACT

8. Respondent is the current owner of the Site.

9. Mining wastes, including tailings and waste rock, are presently located on portions of the Site. Some of these wastes contain elevated concentrations of certain heavy metals including arsenic, cadmium, lead, and zinc.

10. Portions of the Site may be used as a recreation area by day hikers and mountain bikers.

11. Snow melt and stormwater run-off flowing over mining wastes at the Site may impact surface water which flows down gradient through the Silver Creek watershed.

12. Silver Creek and its tributaries are listed on the State of Utah's Clean Water Act Section 303(d) list of impaired water bodies for non-attainment of zinc and cadmium water quality standards.

13. Although limited removal was performed by Respondent simultaneously with preparation of the EE/CA, the EE/CA identified additional response actions necessary to fully address the Waste Material found at the Site.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

14. Based on the Findings of Fact set forth above, and the Administrative Record supporting this Removal Action, EPA has determined that:

(a) The Empire Canyon Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. §9601(9).

(b) Mine waste rock and other materials located on portions of the Site contain "hazardous substance(s)" as defined by Section 101(14) of CERCLA, 42 U.S.C. §9601(14).

(c) The Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. §9601(21).

(d) The Respondent, the current owner and operator of the Site, is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. §9607(a).

(e) The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. §9601(22).

(f) The Removal Action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. NOTICE AND ORDER

15. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

16. All work performed under this Order shall be under the direction and supervision of qualified personnel. The Respondent has notified EPA that it intends to use the following personnel in carrying out such work: Kerry C. Gee of United Park, and James Fricke of RMC, 8138 South State Street, Suite 2A, Midvale UT 84047, (801) 225-2626. EPA hereby approves Respondent's use of the foregoing personnel and consultants in performing the work called for herein. In the event that Respondent desires to use different or additional personnel, Respondent shall, in advance of using such personnel, notify EPA in writing of the names, titles, and qualifications of the personnel, including the contractors, subcontractors, consultants and laboratories to be used in carrying out such work. The qualifications of any new or additional persons undertaking the work for Respondent shall be subject to EPA's review, for verification that such persons meet minimum technical background and experience requirements. If EPA disapproves in writing of any person(s)' technical qualifications, Respondent shall notify EPA of the identity and qualifications of the replacement(s) within 30 days of the written notice. If EPA subsequently disapproves of the replacement(s), EPA reserves the right to terminate this Consent Order. Such does not, however, affect Respondent's responsibility to use personnel acceptable to EPA.

17. Respondent hereby designates Kerry Gee as the Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Order. To the extent practicable, the Project Coordinator shall be present on Site or readily available during Site work. EPA hereby approves Respondent's designated Project Coordinator. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by Respondent.

18. EPA has designated Jim Christiansen of the Office of Ecosystems Protection and Remediation, Region 8, as its On-Scene Coordinator ("OSC"). Except as otherwise provided in this Order or at the direction of the OSC, Respondent shall direct all submissions required by this Order to the OSC at 999 18th Street, Suite 300, Denver, Colorado 80202.

19. EPA and Respondent shall have the right, subject to this Section, to change their respective designated OSC and Project Coordinators. Respondent shall notify EPA ten (10) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

20. Work to Be Performed. Respondent shall perform the Removal Action as selected in the Action Memorandum.

21. Work Plan and Implementation

(a) Within 30 days after the effective date of this Order, the Respondent shall submit to EPA for approval a draft Work Plan for performing the Removal Action set forth in the Action Memorandum. The draft Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Order.

(b) EPA may approve, disapprove, require revisions to, or modify the draft Work Plan. If EPA requires revisions, Respondent shall submit a revised draft Work Plan within 15 days of receipt of EPA's notification of the required revisions. Stipulated penalties shall not accrue during any such period. Respondent shall implement the Work Plan as finally approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be fully enforceable under this Order. Respondent shall notify EPA at least 48 hours prior to performing any on-site work pursuant to the EPA-approved Work Plan.

(c) The draft Work Plan shall also include a proposal for performance of post-removal site control measures, to the extent necessary, to be implemented once the Removal Action has been completed. This proposal shall be consistent with the requirements of Section 300.415(k) of the NCP and with OSWER Directive 9360.2-02. This proposal must be approved by EPA prior to its implementation and must be implemented within 30 days of completion of the Removal Action.

(d) The draft Work Plan shall also include a Health and Safety Plan (HASP) that ensures the protection of the public health and safety during performance of on-site work under this Order. This plan shall be prepared in accordance with all current applicable Occupational Safety and Health Administration (OSHA) regulations found at 29 CFR Part 1910. Respondent shall incorporate all changes to the HASP recommended by EPA, and implement the plan during the pendency of the Removal Action.

22. Quality Assurance and Sampling

All sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control (QA/QC), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program and require that such laboratory complies with appropriate EPA guidance. Respondent shall provide to EPA the quality assurance/quality control procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

23. Reporting

(a) Respondent shall submit quarterly written progress reports to EPA concerning actions undertaken pursuant to this Order as required by the EPA-approved Work Plan until this Order is terminated, unless otherwise directed by the OSC in writing. These reports shall

describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

(b) The Respondent shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice that the property is subject to this Order to the transferee and written notice to EPA of the proposed conveyance, including the name and address of the transferee. Respondent agrees to require that its successor(s) comply with the immediately proceeding sentence and Paragraph 26 (Access to Property and Information).

24. Final Report

Within 60 days after completion of all actions required under this Order, the Respondent shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Order and costs incurred. The final report shall include a good faith estimate of total costs or a statement of actual costs incurred by Respondent in complying with this Order, a listing of quantities and types of materials removed off-Site or managed on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the Removal Action (e.g., manifests, invoices, bills, contracts, permits, etc.). The final report shall include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

25. Off-Site Shipments.

(a) Respondent shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the On-Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

(i) Respondent shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in

another state.

(ii) The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the Removal Action. Respondent shall provide the information required by this paragraph as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

(b) Before shipping any Waste Material, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. §9621(d)(3), and 40 C.F.R. §300.440. Respondent shall only send Waste Materials from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

(c) Notwithstanding any provision herein, Respondent may consolidate Waste Materials at off-Site areas pre-approved by the OSC, including but not limited to the Richardson Flat containment area

IX. SITE ACCESS

26. Respondent shall, commencing on the Effective Date, provide EPA, the State, and their representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order.

27. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within thirty (30) days after the Effective Date, or as otherwise specified in writing by the OSC. Respondent shall immediately notify EPA if, after using its best efforts, it is unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing its best efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs not inconsistent with the NCP and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

28. Notwithstanding any provision of this Order, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

29. Respondent shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing,

correspondence, or other documents or information related to the Work.

30. Respondent shall also make available to EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

31. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. §9604(e)(7), and 40 C.F.R. §2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

32. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent asserts such a privilege in lieu of providing documents, it shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Respondent.

33. No claim of confidentiality shall be made with respect to any data generated pursuant to this Consent Order, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XI. RECORD RETENTION

34. Until ten (10) years after Respondent's receipt of EPA's notification pursuant to Section XXVII (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

35. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXVII (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

36. At the conclusion of this document retention period, Respondent shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by

EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that certain documents, records and other information (except as provided under paragraph 35 above) are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Respondent.

37. Respondent hereby certifies that, after thorough inquiry and to the best of its knowledge and belief, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State of the filing of suit against it regarding the Site and that Respondent has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. §6927.

XII. COMPLIANCE WITH OTHER LAWS

38. Respondent shall perform all actions required pursuant to this Order in accordance with all applicable federal, state and local laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. §6921(e), and 40 C.F.R. §§300.400(e) and 300.415(j). In accordance with 40 C.F.R. §300.415(j), all on-site actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, and considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws. Respondent shall identify ARARs in the Work Plan, subject to EPA approval.

XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

39. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC or, in the event of his unavailability, the Regional Duty Officer of the Region 8 Emergency Response Branch at (303) 293-1788 (24 hours) of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

40. In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify the OSC and the National Response Center at (800)

424-8802. Respondent shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. §9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11004, *et seq.*

XIV. AUTHORITY OF ON-SCENE COORDINATOR

41. The OSC shall be responsible for overseeing Respondent's implementation of this Order. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other removal action undertaken at the Site. However, any resulting delay of Work shall not be counted in determining Respondent's liability for stipulated penalties, subject to Paragraph 57 below. Absence of the OSC from the Site shall not be cause for stoppage of Work unless specifically directed by the OSC.

XV. PAYMENT OF RESPONSE COSTS

42. Respondent shall pay Future Response Costs, as defined herein. On a periodic basis, EPA will send Respondent a bill requiring payment that includes its regionally prepared financial summary, which shall serve as the basis for payment demands. Unless Respondent and EPA agree to some other payment arrangement, Respondent shall make all payments within forty-five (45) days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 45 of this Order.

43. Respondent shall make all payments required by Paragraph 42 by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making payment and EPA Site/Spill ID number 08CP. Respondent shall send the check(s) to:

Regular Mail:
Mellon Bank
EPA Region 8
Attn: Superfund Accounting
Lockbox 360859
Pittsburgh, Pennsylvania 15251-6859

Express Mail:
EPA 360859
Mellon Client Service Center, Room 670
500 Ross Street
Pittsburgh, Pennsylvania 15262-0001

or other such address as EPA may designate in writing or by wire transfer to:

ABA=021030004
TREAS NYC/CTR/
BNF=/AC-68011008

Wire transfers must be sent to the Federal Reserve Bank in New York.

At the time of payment, Respondent shall send notice that the payment has been made to:

~~Sharon Abendscharr~~
EPA Enforcement Specialist
Empire Canyon Site
U.S. EPA Region 8
Suite 300 (8ENF-*TRC*)
999 18th Street
Denver, CO 80202-2466

Maureen O'Reilly

44. In the event that the payment for Future Response Costs is not made within forty-five (45) days of Respondent's receipt of a bill, interest on Future Response Costs shall begin to accrue and shall continue to accrue until the date of payment or other resolution.

45. Respondent may dispute all or part of a bill for Future Response Costs submitted under this Order, if Respondent alleges that EPA has made an accounting error, or if Respondent alleges that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 43 on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 43 above. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within thirty (30) days after the dispute is resolved.

46. EPA agrees that, to the extent practicable, it will comply with OSWER Directive 9200.0-32P, "Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight" issued by EPA's Office of Solid Waste and Emergency Response (May 17, 2000) to minimize its oversight costs. Failure to comply with this guidance, however shall not effect EPA's rights to recover its Future Response Costs under this Order and shall not be the cause of, or subject to, the dispute resolution provisions of Paragraph 45 or Section XVI.

XVI. DISPUTE RESOLUTION

47. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally. Unless otherwise provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order.

48. If Respondent objects to any EPA action taken pursuant to this Order, including billings for Future Response Costs, it shall notify EPA in writing of its objection(s) within thirty (30) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have thirty (30) days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

49. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, the EPA Region 8 Director of the Superfund Remedial Response Program, Office of Ecosystem Protection and Remediation will issue a final written decision on the dispute to Respondent. Appeal from this final decision shall be to the United States District Court for the District of Utah. If upheld on appeal, EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondent's obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section, except that stipulated penalties shall accrue as provided in Paragraph 57 of Section XVIII. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

XVII. FORCE MAJEURE

50. Respondent agrees to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondent, or of any entity controlled by Respondent, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance.

51. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within 48 hours of when Respondent first knew that the event might cause a delay. Within ten (10) days thereafter, Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

52. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force*

majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not automatically extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of any obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

53. Respondent may be liable to EPA, at EPA's discretion, for stipulated penalties in the amounts set forth in Paragraphs 54, 55, and 56 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*) or unless waived pursuant to Paragraph 62 of this Section. "Compliance" by Respondent shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

54. For the major deliverables identified in the Work Plan, stipulated penalties accrue in the amount of \$250 per day, per violation, for the first seven days of noncompliance; \$500 per day, per violation, for the 8th through 14th day of noncompliance; \$1,000 per day, per violation, for the 15th day through the 30th day; and \$2,000 per day per violation for all violations lasting beyond 30 days.

55. For the interim deliverables identified in the Work Plan, stipulated penalties accrue in the amount of \$250 per day, per violation, for the first week of noncompliance; \$500 per day, per violation, for the 8th through 14th day of noncompliance; \$1,000 per day, per violation, for the 15th day through the 30th day of noncompliance; and \$2,000 per day per violation for all violations lasting beyond 30 days.

56. For the quarterly progress reports, stipulated penalties accrue in the amount of \$250 per day, per violation, for the first week of noncompliance; \$500 per day, per violation, for the 8th through 14th day of noncompliance; \$1,000 per day, per violation, for the 15th day through the 30th day; and \$2,000 per day, per violation, for all violations lasting beyond 30 days.

57. All penalties shall begin to accrue on the day after performance is due (if the date is provided on an EPA approved schedule) or, if not specified, on the day after Respondent is notified, pursuant to the following Paragraph, that complete performance is due or a violation has occurred, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission or deliverable under Section VIII (Work to be Performed) or in the case of work which has been stopped under the direction of the OSC, until thirty days after the date that EPA notifies Respondent of any particular deficiency and/or authorizes Respondent to resume work; and (2) with respect to a decision by the EPA Region 8 Director of the Superfund Remedial

Program level or higher, under Paragraph 49 of Section XVI (Dispute Resolution), until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

58. Following EPA's determination that Respondent has failed to comply with a requirement of this Order, EPA shall give Respondent written notification of the failure and describe the noncompliance. If appropriate, EPA shall also send Respondent a written demand for payment of the penalties.

59. All penalties accruing under this Section shall be due and payable to EPA within fifteen (15) days of Respondent's receipt of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to the address provided in Paragraph 43, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 08CP, the EPA Docket Number, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 43.

60. The payment of penalties shall not alter Respondent's obligation to complete performance of the Work required under this Order.

61. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 58. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. §9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order or in the event that EPA properly assumes performance of a portion or all of the Work pursuant to Section XX. If the dispute resolution process is invoked with regard to stipulated penalties, Respondent shall pay disputed penalties into an escrow account while the dispute is pending. In the event EPA prevails in the dispute, Respondent shall promptly turn over such escrow funds to EPA.

62. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

XIX. COVENANT NOT TO SUE BY EPA

63. In consideration of the actions that will be performed and the payments that will be

made by Respondent under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§9606 and 9607(a) and Sections 309 and 311 of the Clean Water Act, 33 U.S.C. §§1317 and 1319, for performance of the Work and for recovery of Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondent of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondent, its successors and assigns.

XX. RESERVATIONS OF RIGHTS BY EPA

64. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

65. EPA reserves, and this Order is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- (a) claims based on a failure by Respondent to meet a requirement of this Order;
- (b) liability for costs not included within the definition of Future Response Costs;
- (c) liability arising out of performance of response actions other than the Work;
- (d) criminal liability;
- (e) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and
- (f) liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site.

66. **Work Takeover.** In the event EPA determines that Respondent has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any

portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondent shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of this Order, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENT

67. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs, or this Order, including, but not limited to:

(a) any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. §9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

(b) any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. §2412, as amended, or at common law; or

(c) any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§9607 and 9613, relating to the Site.

These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 65 above, but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

68. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. §9611, or 40 C.F.R. § 300.700(d).

XXII. OTHER CLAIMS

69. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

70. Except as expressly provided in Section XIX (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Order, for any liability such person may have

under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§9606 and 9607.

71. No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. §9613(h) or otherwise provided for herein.

XXIII. CONTRIBUTION PROTECTION

72. The Parties agree that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§9613(f)(2) and 9622(h)(4), for "Matters Addressed" as defined in this Order. Nothing in this Order precludes the United States or Respondent from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

XXIV. INDEMNIFICATION

73. Respondent agrees to indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action: (a) arising from, or on account of, acts or omissions of Respondent, Respondent's officers, heirs, directors, employees, agents, contractors, subcontractors, receivers, trustees, successors or assigns, in carrying out actions pursuant to this Order; and (b) for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between (any one or more of) Respondent, and any persons for performance of work on or relating to the Site, including claims on account of construction delays. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including litigation costs arising from or on account of claims made against the United States based on any of the acts or omissions referred to in the preceding paragraph.

74. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

75. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

76. At least seven (7) days prior to commencing any on-Site work under this Order, Respondent shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of one million dollars, combined single limit, naming the United States as an additional insured. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy.

77. In addition, for the duration of the Order, Respondent shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Order. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. MODIFICATIONS

78. The OSC may make modifications to any plan or schedule or Statement of Work in writing or by oral direction with written followup. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

79. If Respondent seeks permission to deviate from any approved work plan or schedule or Statement of Work, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 78.

80. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

XXVII. NOTICE OF COMPLETION OF WORK

81. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including, payment of Future Response Costs, record retention and any post-removal site control measures, EPA will provide written notice to Respondent. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a

violation of this Order.

XXVIII. SEVERABILITY/INTEGRATION/APPENDICES

82. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

83. This Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order.

84. This Order may be signed in counterparts.

XXIX. EFFECTIVE DATE

85. This Order shall be effective upon the day that it is signed by EPA.

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The undersigned representative of Respondent certifies that it is fully authorized to enter into the terms and conditions of this Order and to bind the party it represents to this document.

United Park City Mines

BY: 

Kerry Gee

Authorized Signing Officer

DATE: 11-19-03

AGREED TO AND ORDERED:

U.S. Environmental Protection Agency Region 8

BY: 

Dale Vodehnal, Director

Superfund Remedial Response Program

Office of Ecosystem Protection and Remediation

DATE: 12/12/03